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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

JOHN HUDSON, LARRY BARESEL AND JACK BUTLER RACKLEY,
Petitioners,
v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF 48 STATES AND TERRITORIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF *AMICI* INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Double Jeopardy Clause Does Not Proscribe Civil Sanctions Or Multiple Punishments 4

A. Before *Halper*, The Court Treated Civil And Criminal Cases Differently 5

B. Before *Halper*, The Court Had Never Held That Double Jeopardy Separately Bars Multiple Punishments 9

C. *Halper* Erred In Striking An Allegedly Excessive Civil Sanction Under The Double Jeopardy Clause 11

II. *Halper* Has Been Unworkable In Practice 14

III. Abandonment Of The *Halper* Analysis Will Not Measurably Diminish Protection From Prosecutorial Or Legislative Overreaching 19

A. *Ursery* Limited *Halper's* Application 19

B. After *Ursery*, It Is Not Clear What Additional Protection *Halper* Provides 20

C. The Excessive Fines And Due Process Clauses Provide A More Natural Framework For Curbing Excessive Fines 22

CONCLUSION 26

TABLE OF AUTHORITIES

CASES **PAGE**

Albernaz v. United States,
450 U.S. 333 (1981) 9,20
Austin v. United States,
509 U.S. 602 (1993) 2,4,23
Blackledge v. Perry,
417 U.S. 21 (1974) 24
Brady v. Daly,
175 U.S. 148 (1899) 6
Breed v. Jones,
421 U.S. 519 (1975) 5,12
Browning-Ferris Industries v. Kelco Disposal,
492 U.S. 257 (1989) 22,23
Burks v. United States,
437 U.S. 1 (1978) 10
Crist v. Bretz,
437 U.S. 28 (1978) 12
Department of Revenue v. Kurth Ranch,
511 U.S. 767 (1994) 9,12,13,21
Ex parte Lange
85 U.S. (18 Wall.) 163 (1874) 11,12
Helvering v. Mitchell,
303 U.S. 391 (1938) 6,11
In Re Forfeiture of 1990 Chevrolet Blazer,
684 So.2d 197 (Fla. Ct. App. 1996),
review denied, 695 So.2d 699 (Fla. 1997) 23
Jones v. Thomas,
491 U.S. 376 (1989) 24
Justices of Boston Municipal Court v. Lydon,
466 U.S. 294 (1984) 19

Kansas v. Hendricks,
117 S. Ct. 2072 (1997) 8
Kvitka v. Board of Registration,
407 Mass. 140, 551 N.E.2d 915 (1990),
cert. denied, 498 U.S. 823 (1990) 18
Missouri v. Hunter,
459 U.S. 359 (1983) 2,10,12,14,16
Mullett v. Miller,
168 Ariz. 594, 816 P.2d 251
(Ariz. Ct. App. 1991), *cert. denied*,
502 U.S. 1122 (1992) 17,18
Myers v. United States,
272 U.S. 52 (1926) 13
North Carolina v. Pearce,
395 U.S. 711 (1969) 10,24
Ohio v. Johnson,
467 U.S. 493 (1984) 9
Patel v. United States,
1992 U.S. Dist. LEXIS
560 (N.D. Ill. 1992) 18
People v. Shaughnessy,
170 Misc.2d 765, 650
N.Y.S.2d 961 (N.Y. Dist. Ct. 1996) 18
Rex Trailer Co. v. United States,
350 U.S. 148 (1956) 7
Sandin v. Conner,
115 S. Ct. 2293 (1995) 1,14
Schiro v. Farley,
510 U.S. 222 (1994) 5,12,22
Serfass v. United States,
420 U.S. 377 (1975) 5,12,13
Simpson v. United States,
435 U.S. 6 (1978) 13

Small v. Commonwealth,
12 Va. App. 314, 314 S.E.2d 927
(Va. Ct. App. 1991) 18
State v. A House and 1.37 Acres of Real Property Located At 392 South 600 East,
886 P.2d 534 (Utah 1994) 23
State v. Hickham,
1995 Conn. Super. LEXIS 1215
(Conn. Super. Ct. 1995) 18
State v. Osorio,
1996 Tex. App. LEXIS 5630
(Tex. Ct. App. 1996) 18
Thompson v. Grindle,
113 Md. App. 477,
688 A.2d 466 (Md. Ct. App. 1997),
cert. granted, 346 Md. 28, 694 A.2d 951 (1997) 23
United States v. Dean,
80 F.3d 1535 (11th Cir. 1996) 23
United States v. Dixon,
509 U.S. 688 (1993) 2,14
United States v. Goodwin,
457 U.S. 368 (1982) 4,23,24
United States v. Hall,
730 F. Supp. 646 (M.D. Pa. 1990) 18
United States v. Halper,
390 U.S. 435 (1989) . . . . . *passim*
United States ex rel. Marcus v. Hess,
317 U.S. 537 (1943) 5,6,9,13,24
United States v. Millan,
2 F.3d 17 (2d Cir. 1993),
cert. denied, 510 U.S. 1092 (1994) 15
United States v. One Assortment of 89 Firearms,
465 U.S. 354 (1984) 2,5,6,7,8
United States v. One Single Family Residence Located at 18755 North Bay Road,
13 F.3d 1493 (11th Cir. 1994) 15,23

United States v. Real Property Located at 6625 Zumirez Drive, 845 F. Supp. 725 (C.D. Cal. 1994) 23
United States v. Sanchez, 1990 U.S. Dist. LEXIS 20194 (S.D. Tex. 1990) 17
United States v. Sanchez-Escareno, 950 F.2d 193 (5th Cir. 1991), *cert. denied*, 506 U.S. 841 (1992) 17
United States v. Sarbello, 985 F.2d 716 (3rd Cir. 1993) 23
United States v. Scott, 437 U.S. 82 (1978) 5
United States v. Ursery, 116 S. Ct. 2135 (1996) 3,19,20,21
United States v. Ward, 448 U.S. 242 (1980) 2,6,7,11,19
United States v. Wilson, 420 U.S. 332 (1975) 5
W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) 20
Whalen v. United States, 445 U.S. 684 (1980) 9
Williams v. Oklahoma, 358 U.S. 576 (1959) 12
Williamson v. Lee Optical, 348 U.S. 483 (1955) 20
Winchester v. Stein, 86 Wash. App. 458, 937 P.2d 618 (Wash. Ct. App. 1997) 18
Wright v. State, 112 Nev. 391, 916 P.2d 146 (1996) 18

CONSTITUTION

U.S. Const., amend. V 4

MISCELLANEOUS

Amar, Double Jeopardy Law Made Simple 1906 Yale L.J. 1807 (1997) 8

Brief for the United States, *United States v. Ursery*, Nos. 95-345 and 95-346 (O.T. 1995) 24

STATEMENT OF *AMICI* INTEREST

Amici curiae States of Ohio and Utah, together with 46 other States and Territories, write in support of respondent to affirm the judgment below and in the process to ask the Court to reexamine *United States v. Halper*, 490 U.S. 435 (1989), which applied the double jeopardy clause of the Fifth and Fourteenth Amendments for the first time to multiple civil sanctions.

We do not make this request lightly. The Court understandably reconsiders its decisions only rarely, and even then only when time shows the case to be mistaken in its legal underpinnings and unworkable in practice. While the burden is high, we respectfully submit that *Halper* satisfies it, particularly since we do not ask the Court to abandon the conclusion of unconstitutionality in *Halper*, but rather "only" to "abandon" an analytical "approach that in practice is difficult to administer and which produces anomalous results." *Sandin v. Conner*, 115 S. Ct. 2293, 2300 n.5 (1995).

In applying the double jeopardy clause to civil sanctions, *Halper* established a new test for ascertaining whether a civil sanction was so pervasively punitive and stigmatizing as to warrant double jeopardy treatment. The *Halper* test is not supported by the text and history of the double jeopardy clause, as well as the case law construing the clause; it has been unworkable in practice and has generated an unprecedented amount of State-court litigation; and it has not even meaningfully advanced individual liberties in view of other restraints on government, such as the excessive fines and due process clauses. For these reasons and those elaborated below, we submit this *amici curiae* brief for the Court's consideration.

SUMMARY OF ARGUMENT

Halper merits reconsideration for three independent reasons. **First**, the decision mistakenly created a new, difficult-to-apply, and ultimately mistaken double jeopardy test for civil sanctions. Consistent with the text of the prohibition, which refers to twice putting individuals in "jeopardy" for the "same offense," the clause simply does not apply in the civil context. The only exception is where the sanctions are not in fact civil but criminal, *see United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984), and *United States v. Ward*, 448 U.S. 242, 248-49 (1980), in which case not just the double jeopardy clause but the full panoply of constitutional criminal-procedure protections restricts the government. Nor does the double jeopardy clause separately prohibit multiple punishments -- whether civil or criminal -- for the same offense. As *Missouri v. Hunter*, 459 U.S. 359 (1983), makes clear, a legislature may impose two or more punishments for the same offense in one proceeding. And, while the government may not twice punish an individual for the same offense in two proceedings, that follows from the multiple-proceeding restriction of the clause, not from a freestanding multiple-punishments prohibition.

Second, in the eight years since *Halper* was decided, the new doctrine has been difficult to apply, has been exceedingly burdensome on the States to litigate, and has generated considerable "confusion." *United States v. Dixon*, 509 U.S. 688, 711 (1993). It is doubtful whether any case citation from the last decade has generated more lower-court applications than *Halper*. The problem stems in part from language in the opinion, later repeated in *Austin v. United States*, 509 U.S. 602 (1993), that any and all civil sanctions escalate into criminal punishment if they cannot be explained "solely" on remedial, as opposed to deterrent or retributive,

grounds. 490 U.S. at 448. That places a high if not impossible burden on the States because most government sanctions serve a variety of goals, many of which cannot be neatly compartmentalized.

Halper also asks a lot of State legislators, judges and attorneys who earnestly wish to obey their oaths to follow the Constitution. Though reaching an intuitively-correct result, *Halper* creates a counter-intuitive inquiry. For the first time, the case abandons a legislative universe in which State laws fall into a civil or criminal camp, creating an in-between sanction that is part civil (because it still does not receive the traditional constitutional protections of a criminal proceeding) and part criminal (because it does receive the protections of the double jeopardy clause). Making matters more confusing is *Halper*'s refusal to overrule a series of cases that had long adhered to the traditional civil/criminal dichotomy and that had followed a straightforward test for ascertaining on which side of the line a law fell. Nor does *United States v. Ursery*, 116 S. Ct. 2135 (1996), solve this problem, as it simply halves the inquiry yet again into whether an *in personam* or an *in rem* proceeding was involved, with *Halper* governing the former but not the latter. Even the most well-meaning and capable of State lawmakers face a daunting task in navigating these doctrinal shoals.

Finally, while these burdens might well be justified if the new doctrine measurably advanced the individual liberties that the double jeopardy clause was designed to serve, *Halper* has not done so in any meaningful way. As an initial matter, it remains unclear why the traditional protection offered in this area -- an inquiry into whether the civil proceeding really ought to be treated as a criminal one -- does not address the concerns expressed in *Halper* and the facts of *Halper* itself. But even if not, even if the *Halper* civil sanction would still amount to a civil proceeding under the traditional test, other

protections more naturally lend themselves to the protection Mr. Halper sought. In particular, the excessive fines clause directly prevents the government from imposing grossly disproportionate fines, *see Austin v. United States*, 509 U.S. 602 (1993), while the due process clause prevents vindictive prosecutions, *see, e.g., United States v. Goodwin*, 457 U.S. 368 (1982).

In the end, the *amici* States do not quibble with the result in *Halper*. They just disagree with the doctrinal changes in double jeopardy law that it announced together with the confusion these changes have spawned.

ARGUMENT

I. The Double Jeopardy Clause Does Not Proscribe Civil Sanctions Or Multiple Punishments.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

U.S. Const., amend. V (emphasis added).

Wedged between the grand jury clause (limited to any "capital and otherwise infamous crime") and the self-incrimination clause (applicable to "any criminal case"), the double jeopardy clause prevents the government from putting a person "in jeopardy of life or limb" more than once for the

"same offense." The "core . . . area protected" by the clause (*United States v. Scott*, 437 U.S. 82, 96 (1978)) has long been the citizen's right not to be tried twice for the same criminal charge. *United States v. Wilson*, 420 U.S. 332, 343 (1975). *See Schiro v. Farley*, 510 U.S. 222, 230 (1994) ("The prohibition against multiple trials is the controlling constitutional principle") (internal citation omitted).

Prior to *Halper*, the Court's double jeopardy holdings all adhered to the clear import of the clause's context and language: It concerned criminal, not civil, cases, *see United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548-49 (1943) ("[o]nly" "criminal punishment" "subject[s] the defendant to 'jeopardy' within the constitutional meaning"), and dealt with the risk of two prosecutions, not the fact of two sanctions. *See Breed v. Jones*, 421 U.S. 519, 528 (1975) ("Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution"); *Serfass v. United States*, 420 U.S. 377, 391 (1975) ("Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier having jurisdiction to try the question of the guilt or innocence of the accused") (internal quotation omitted).

A. Before *Halper*, The Court Treated Civil And Criminal Cases Differently.

In accordance with this understanding, two general inquiries governed double jeopardy challenges to civil sanctions before *Halper*. In the first stage, courts looked at the legislative design: Did the legislature authorize the sanction and did it treat the proceeding as a criminal or civil one? In the second stage, courts looked to "'whether the statutory scheme was so punitive either in purpose or effect as to negate' Congress' intention to establish a civil remedial

mechanism." *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984) (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

In the half century before *Halper*, the Court applied this test in a series of cases involving civil sanctions that allegedly created double jeopardy bars. In the first of these cases, *Helvering v. Mitchell*, 303 U.S. 391 (1938), the Court considered whether a civil sanction (a 50% penalty on top of the government's actual losses) could be obtained from a defendant who had earlier been acquitted on criminal charges arising from the same conduct. Reasoning that the question was whether the later civil proceeding was "essentially criminal" in nature and therefore an attempt to prosecute criminally a second time, *id.* at 398-99, Justice Brandeis wrote that "Congress may impose both a criminal and civil sanction in respect to the same act or omission," *id.*, and properly could do so in that case. At the same time, he recognized an outer limit to the legislature's drafting authority -- that "Congress may not provide civil procedure for the enforcement of punitive sanctions." 303 U.S. at 402.

United States ex rel. Marcus v. Hess, 317 U.S. 537, 549-51 (1943), followed the same course. It held that double jeopardy did not bar a monetary penalty nearly three times the amount of the government's losses, even though the defendants had previously been convicted of defrauding the government. In doing so, the Court acknowledged that "'[p]unishment, in a certain and very limited sense, may be the result of the statute before us so far as the wrongdoer is concerned,' but this is not enough to label it as a criminal statute." *Id.* at 551 (quoting *Brady v. Daly*, 175 U.S. 148, 157 (1899)). Recognizing the latitude that legislatures need to draft remedial statutes, the Court acknowledged the "inherent difficulty of choosing a proper specific sum which would give full restitution." *Id.* at 552.

The Court reached a like result in *Rex Trailer Co. v. United States*, 350 U.S. 148 (1956), upholding a civil sanction -- in the amount of a $2,000.00 fine for each of five counts of fraud, plus double damages and costs -- despite the defendant's earlier criminal conviction. The civil remedy, the Court noted, "merely accomplishes the intended result of Congress by authorizing a separate proceeding for the recovery of a lump sum in damages." *Id.* At the same time, the Court again recognized that there was an outer limit: A civil remedy could not be "so unreasonable or excessive that it transformed what was clearly intended as a civil remedy into a criminal penalty." *Id.* at 154. *Rex Trailer* also reemphasized that the government need not establish accountings of its damages in order to enforce a civil remedy: "It is insisted, however, that the failure of the Government to allege specific damages precludes recovery here. But there is no requirement, statutory or judicial, that specific damages be shown." *Id.* at 152-53. As the Court acknowledged, damages frequently may be "unmeasurable," and "the fact that no damages are shown is not fatal." *Id.* at 153.

Lastly, in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365 (1984), the Court upheld a civil forfeiture following a gun owner's acquittal on criminal charges related to firearm sales without a license. In considering whether the civil action was "intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial," *id.* at 362, the Court hewed to the two-step inquiry: (1) "'whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other,'" and (2) "'whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.'" *Id.* at 362-63 (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)). In the end, the Court concluded, "only the clearest proof that the

purpose and effect of the forfeiture are punitive will suffice to override Congress' manifest preference for a civil sanction." *Id.* at 365 (citation and quotation omitted).

In all four cases, the Court initially looked to the language of the statutes to determine whether the legislature meant to create a civil remedy and whether it had plainly authorized the sanction. This of course accords with due process principles of notice. Next, even assuming the legislature had authorized such a sanction, the Court asked if the statute was so stigmatizing as to rise to the level of a criminal statute -- or, as the Court put it most recently, "so punitive either in purpose or effect as to negate" the government's decision to label the punishment "civil." *Kansas v. Hendricks*, 117 S. Ct. 2072, 2082 (1997) (internal quotations omitted). In none of the cases did the Court hold that the double jeopardy clause applies to civil sanctions. At most, they merely assumed that if a civil sanction was sufficiently punitive, the law warranted the label of a criminal statute and what comes with it -- additional constitutional protections. But in that situation, the double jeopardy clause would be "the least of the state's problems" in view of the other criminal procedure safeguards it must provide. Amar, *Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807, 1834 (1997).

B. Before *Halper*, The Court Had Never Held That Double Jeopardy Separately Bars Multiple Punishments.

Nor, prior to *Halper*, had the Court ever held that the risk-releasing language of the clause (freeing individuals from being "twice put in jeopardy") extends beyond serial prosecutions to restrict the imposition of more than one punishment. Several cases no doubt refer to, and seem to assume the possibility of, a multiple-punishment prong of the double jeopardy clause. *See, e.g., Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 804-05 (1994) (Scalia, J., dissenting); *Hess*, 317 U.S. at 553 (Frankfurter, J., concurring). But in each case the intermingling of the two concepts may simply be shorthand for the basic truth that the government may not twice punish an individual for the same offense in two proceedings. Yet that limitation follows from the multiple-proceeding restriction of the clause, not from a freestanding multiple-punishments prohibition.

At any rate, *dicta* suggesting the existence of a multiple-punishments bar is equally matched by *dicta* suggesting the opposite. Several cases forcefully state that the number of punishments that may be exacted for criminal activity is the prerogative of the legislature, and is not limited by the double jeopardy clause. *See, e.g., Ohio v. Johnson*, 467 U.S. 493, 499 (1984) ("protection against cumulative punishmen[t] is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature"); *Albernaz v. United States*, 450 U.S. 333, 344 (1981) ("the question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed"); *Whalen v. United States*, 445 U.S. 684, 697 (1980) (Blackmun, J., concurring) ("The *only* function the

Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended").

Any doubt about the issue, moreover, was seemingly put to rest in *Missouri v. Hunter*, 459 U.S. 359 (1983). At stake in *Hunter* was whether the government could impose two or more punishments for the same offense in one proceeding. The lower court barred the multiple punishments due to "statements of this Court that the Double Jeopardy Clause also 'protects against multiple punishments for the same offense.'" *Id.* at 366 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). In reversing, the Court reasoned that the clause "is cast explicitly in terms of being 'twice put in jeopardy,'" which is why the clause has been "consistently interpreted" to prevent "'an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'" *Id.* at 365 (quoting *Burks v. United States*, 437 U.S. 1, 11 (1978)). For these reasons, the Court concluded that "the Missouri Supreme Court has misperceived the nature of the Double Jeopardy Clause's protection against multiple punishments," and accordingly held that the clause does not prohibit multiple punishments in one proceeding. *Id.* at 366.

In light of *Missouri v. Hunter*, one might have thought that the multiple-punishments issue had been resolved. The alleged restriction did not apply at all to single proceedings, and was utterly superfluous in multiple proceedings in view of the pre-existing multiple-prosecution bar established by the clause.

C. *Halper* Erred In Striking An Allegedly Excessive Civil Sanction Under The Double Jeopardy Clause.

Yet *United States v. Halper*, 490 U.S. 435 (1989), established a new test for ascertaining the difference between criminal and civil sanctions, and applied the double jeopardy clause for the first time to multiple punishments. While the Court's concern about the government's overreaching in that case seems appropriate even today, *Halper's* answer to that problem disregarded the text and history of the clause and the case law decided under it.

Halper first parted ways with the traditional two-step analysis for examining whether a civil sanction implicates the double jeopardy clause, by looking first to whether the legislature intended to create a civil statute, then applying the *Ward* test for ascertaining whether the sanction was so pervasively punitive as to amount to a criminal statute. In abandoning that inquiry, *Halper* for the first time created a third type of statute, one that is neither civil (because it is sufficiently punitive to warrant double jeopardy protection) nor criminal (because it does not warrant the other protections given criminal proceedings). Compare *Helvering*, 303 U.S. at 399 ("The question for decision is thus whether the [statute] imposes a criminal sanction."). The opinion offers no justification for creating this hybrid category of offenses or for abandoning the normal inquiry in this area.

Nor does *Halper* offer a satisfactory explanation for applying the double jeopardy bar for the first time to a second punishment. The only case offered for this proposition was *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874). But the federal criminal statute under which the defendant had been convicted there permitted the trial court

to impose a jail term *or* a monetary fine, while the trial judge imposed both. *Id.* at 175-78. In holding that the trial judge acted improperly, the Court relied on both the double jeopardy and due process clauses. *Id.* at 170. The reference to double jeopardy, however, was far from necessary to the result, as all agreed then and have agreed since that due process prohibits deprivations of liberty in excess of that authorized by law. *See Williams v. Oklahoma*, 358 U.S. 576, 586 (1959) (rejecting due process challenge to sentence "which was within the range of punishments authorized for that crime by the law of the state").

No less lacking in support is *Halper's* conclusion that the framers meant to subject civil governmental actions to double jeopardy review. *See Halper*, 490 U.S. at 440. In prohibiting government from "twice put[ting]" individuals "in jeopardy" for the "same offense," the language of the clause focuses on the exposure to public denunciation and stigma associated with a criminal charge. An accused quite simply "must suffer jeopardy before he can suffer double jeopardy." *Serfass v. United States*, 420 U.S. at 393. And "[j]eopardy denotes risk," a concept that in "the constitutional sense . . . is traditionally associated with a criminal prosecution." *Breed v. Jones*, 421 U.S. 519, 528 (1975). *See Crist v. Bretz*, 437 U.S. 28, 34-36 (1978) ("jeopardy" protects defendant from repeated attempts "to convict"). The clause thus protects those who twice face the risk of punishment, not those who twice receive it. *See Schiro v. Farley*, 510 U.S. 222, 230 (1994) ("our cases establish that the primary evil to be guarded against is successive prosecutions: 'The prohibition against multiple trials is the controlling constitutional principle'") (citation omitted); *Missouri v. Hunter*, 459 U.S. at 365 ("We have consistently interpreted [the clause] 'to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.'") (citation omitted); *Department of*

Revenue v. Kurth Ranch, 511 U.S. 767, 804-05 (1994) (Scalia, J., dissenting) ("It is time . . . to acknowledge what the text of the Constitution makes perfectly clear: the Double Jeopardy Clause prohibits successive prosecution, not successive punishment"); *Simpson v. United States*, 435 U.S. 6, 19 (1978) (Rehnquist, J., dissenting) ("Certainly the language of the double jeopardy provision of the Fifth Amendment . . . has not the slightest application" to multiple punishment cases). Even the most accommodating method for discerning constitutional meaning cannot square the simple words of the text with a freestanding multiple-punishment bar.

Nor does *Halper's* contrary conclusion have a distinguished -- indeed even extant -- historical pedigree. "Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier having jurisdiction to try the question of the guilt or innocence of the accused." *Serfass*, 420 U.S. at 391 (quotation omitted). Before and after ratification of the Fifth Amendment, moreover, legislatures frequently provided civil and criminal sanctions for the same conduct. *See Hess*, 317 U.S. at 555-56 (Frankfurter, J., concurring) (legislation "providing two sanctions for the same misconduct, enforceable in separate proceedings, one a conventional criminal prosecution, and the other a forfeiture proceeding or a civil action as upon a debt, was quite common when the Fifth Amendment was framed by Congress," and the Framers of the Constitution "contemporaneously enacted and continued to enact legislation" of this type). *See Myers v. United States*, 272 U.S. 52, 174-75 (1926) (the First Congress "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument").

II. *Halper* Has Been Unworkable In Practice.

Halper "was not only wrong in principle; it has already proved unstable in application," *United States v. Dixon*, 509 U.S. 688, 709 (1993), and has generated considerable "confusion," *id.* at 711 (internal quotation omitted). *See Sandin v. Conner*, 115 S. Ct. 2293, 2300 n.5. ("Our decision today only abandons an approach that in practice is difficult to administer and which produces anomalous results"). Two features of post-*Halper* double jeopardy law have generated particular confusion and litigation.

First, States must reconcile *Halper* with *Missouri v. Hunter*, which at first blush look like polar opposites. *Hunter* seems to create a presumption in favor of multiple punishments, merely asking the States to show legislative authorization (and notice) before imposing them. Yet *Halper* seems to create a presumption against multiple punishments, asking the States to justify their non-punitive nature before imposing them. In trying to resolve this tension, *Halper* says that *Hunter* remains good law if the multiple punishments were imposed in the same proceeding, but that *Hunter* does not apply if the multiple punishments were imposed in different proceedings. 490 U.S. at 450. The answer from the government's perspective, in other words, is to lump all civil and criminal sanctions in one hybrid proceeding, which would satisfy both *Hunter* and *Halper*.

Even assuming that these threads of analysis hold together and that they do not fray in the minds of most federal and State lawmakers, the final solution alters time-honored assumptions about government authority. Neither the States nor the federal government has ever imposed civil and criminal sanctions in one proceeding. And the prospect of doing so now raises a host of awkward questions.

From opening charge to judgment, criminal and civil proceedings operate under different procedural rules and different constitutional obligations. To take the most obvious examples under the Constitution, the states must comply with the right to a speedy trial, the right to be informed of the nature of the accusation, the right to confrontation, the right against self-incrimination, and the right to counsel under the Fifth, Sixth and Fourteenth Amendments, as well as the beyond a reasonable doubt and effective assistance of counsel rights of the Fourteenth Amendment. The rules of discovery, evidence, procedure and appeal for the two proceedings also differ markedly from one to the other, and different governmental agencies frequently bring the different actions.

What, then, would the States do in this situation? They could not try all of the sanctions together in one civil proceeding, lest they violate the defendant's constitutional rights with respect to the criminal charges. And they could not try all of the sanctions in one criminal proceeding, lest they violate the legislature's prerogative to establish civil proceedings for remedial sanctions. That leaves one option -- trying the two types of sanctions together in a hybrid proceeding.

But that is really no option at all. Such a hybrid proceeding would require the empanelling of two different juries, would presumably require two different sets of government lawyers, would lead to different evidentiary and discovery rulings concerning the same evidence and would turn on different burdens of proof. Not surprisingly, in light of these and other obstacles, our system of justice has never joined together civil and criminal actions in a single trial. *See, e.g., United States v. Millan*, 2 F.3d 17, 20 (2d Cir. 1993), *cert. denied*, 510 U.S. 1092 (1994); *United States v. One Single Family Residence*, 13 F.3d 1493, 1499 (11th Cir. 1994).

But even if these logistical hurdles could be overcome, what defendant could possibly want the double jeopardy protection that a hybrid proceeding would provide? If a criminal trial is traumatic, how much worse to combine it with another proceeding that adheres to different rules and that even the ablest attorney would be strained to follow. Surely the confusion generated by such a proceeding would make a defendant fairly wonder if the cure was not worse than the disease.

In the last analysis, *Halper*'s solution to the tension between it and *Hunter* is not tenable. The Constitution does not force States to sacrifice one constitutionally-permissible cause of action in order to assert another; and it does not compel States to join civil and criminal actions in a one-size-fits-all hybrid proceeding. Either *Halper* or *Hunter* must govern whether double jeopardy bars multiple punishments, but not both.

Halper has generated a second problem at the State level, a drawn-out battle over the standard for determining whether a civil sanction is remedial or not. In some places, the opinion describes the test in lenient terms -- as "a rule for the rare case," 490 U.S. at 449, as applicable only when the sanction is "overwhelmingly disproportionate," *id.*, and as applicable only when the sanction "bears no rational relation to the goal of compensating the Government for its loss," *id.* In other places, the opinion appears to establish a stringent test -- characterizing sanctions that "cannot fairly be said *solely* to serve a remedial purpose" as punitive, *id.* at 448 (emphasis added), and providing that sanctions "also serving either retributive or deterrent purposes" are improper, *id.*

Much like the parties to this case (compare Brief for Petitioners, 12, with Brief for the United States), State prosecutors and Attorney General offices have waged a series

of fights with criminal defendants over this language. The stakes are high in view of the sizeable difference between proving that a sanction has a "rational" remedial goal and proving that it is "solely" remedial. Because all sanctions, civil or criminal, serve deterrent purposes and because most can be characterized as serving retributive goals, these cases are difficult to litigate and often hard to defend.

The upshot has been constant State and federal court litigation over legislation that until 1989 was assumed to be perfectly acceptable. Whether it be reasonable fines, drivers' license suspensions, professional license suspensions, or administrative discipline in schools, prisons and government offices, the States have confronted a unique volume of litigation over the timing and legitimacy of these sanctions. While the burden of this litigation is difficult fully to quantify, a LEXIS search performed on August 18, 1997 produced 1,269 double jeopardy cases citing *Halper*.

Some examples of successful *Halper* defenses are worth highlighting. For example, several courts have blocked criminal prosecution after civil sanctions have been imposed, allowing the defendant to walk free with no criminal record and no criminal penalty. *See, e.g., United States v. Sanchez-Escareno*, 950 F.2d 193, 203 (5th Cir. 1991) ("If the defendants actually pay the civil fines, then any subsequent criminal prosecution would be double jeopardy"), *cert. denied*, 506 U.S. 841 (1992); *United States v. Sanchez*, 1990 U.S. Dist. LEXIS 20194, *18 (S.D. Tex. 1990) (finding that double jeopardy barred a smuggling prosecution following imposition of U.S. Customs Service fines of $232,000); *Mullett v. Miller*, 168 Ariz. 594, 597-98, 816 P.2d 251, 254-55 (Ariz. Ct. App. 1991) ("In the event that the administrative penalty is determined to be a punishment, the underlying criminal proceeding must be dismissed, to the extent that the charges are based on the same conduct that

was the basis of the [civil] proceeding"), *cert. denied*, 502 U.S. 1122 (1992); *State v. Hickham*, 1995 Conn. Super. LEXIS 1215, *16 (Conn. Super. Ct. 1995) (dismissing criminal case following imposition of administrative sanction); *People v. Shaughnessy*, 170 Misc.2d 765, 768, 650 N.Y.S.2d 961 (N.Y. Dist. Ct. 1996) (dismissing criminal fraud charges); *Wright v. State*, 112 Nev. 391, 916 P.2d 146, 153 (1996) (reversing defendant's criminal conviction because defendant had earlier paid a $30,000 civil fine); *State v. Osorio*, 1996 Tex. App. LEXIS 5630, *7 (Tex. Ct. App. 1996) (drug penalty against defendant precluded subsequent prosecution for drug possession); *Small v. Commonwealth*, 12 Va. App. 314, 402 S.E.2d 927 (Va. Ct. App. 1991) (en banc) (holding that imposition of civil contempt fines barred later criminal sanctions).

As a general matter, *Halper* also has been the basis for the invalidation of a wide range of civil sanctions. *See, e.g., Patel v. United States*, 1992 U.S. Dist. LEXIS 560, *9 (N.D. Ill. 1992) (holding that double jeopardy barred imposition of a fine where the defendant had already been convicted); *United States v. Hall*, 730 F. Supp. 646, 655 (M.D. Pa. 1990) (finding that assessment of civil fine where the defendant had already been convicted and fined violated the double jeopardy clause); *Kvitka v. Board of Registration*, 407 Mass. 140, 145-46, 551 N.E.2d 915, 918 (1990) (vacating fine imposed by medical licensing board following criminal conviction for illegal drug dispensing), *cert. denied*, 498 U.S. 823 (1990); *Winchester v. Stein*, 86 Wash. App. 458, 465, 937 P.2d 618 (Wash. Ct. App. 1997) (vacating $250,000 civil fine that went into the Washington Anti-Criminal Profiteering Revolving Fund because the fine was not designed solely to reimburse the State for its costs in the case).

III. Abandonment Of The *Halper* Analysis Will Not Measurably Diminish Protection From Prosecutorial Or Legislative Overreaching.

All of this might well be justified if *Halper* meaningfully curbed "governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 310 (1984) (citation omitted). But it is not clear that it has done so, or that it will do so in the future.

A. *Ursery* Limited *Halper's* Application.

To a large degree, the Court has already abandoned the *Halper* analysis and some of the problems it has generated. In *United States v. Ursery*, 116 S. Ct. 2135 (1996), the Court made clear that *Halper* does not govern double jeopardy challenges to *in rem* forfeiture proceedings, *id.*, and clarified that *Halper* does not require the government to show that sanctions are "solely" remedial in order to withstand a double jeopardy challenge, *id.* at 2145 n.2.

In light of *Ursery*, lower courts now apply two double jeopardy tests to civil sanctions. Forfeitures receive review under the traditional test: Did the legislature authorize the sanction and intend it to be imposed in a civil proceeding? And if so has the defendant established the "'clearest proof'" that the sanction is "so punitive in form and effect as to render [it] criminal despite Congress' intent to the contrary"? *Id.* at 2148 (quoting *Ward*, 448 U.S. at 249). Civil fines, however, still receive review under the modified *Halper* analysis: Does the sanction have a rational relationship to a remedial goal?

Ursery, then, both mitigates and magnifies the problems caused by *Halper*. Clarification of the *Halper dicta* no doubt will reduce much of the litigation in this area, and relegating *Halper* to civil fines will eliminate much of the litigation over forfeitures. Yet, even with these clarifications, the current state of double jeopardy law demands a lot of State prosecutors and judges, to say nothing of State legislators. *See Albernaz v. United States*, 450 U.S. 333, 343 (1981) (describing the pre-existing "veritable Sargasso Sea" of double jeopardy law "which could not fail to challenge the most intrepid judicial navigator"). There is nothing intuitive about applying a constitutional doctrine that calls for one test in the context of forfeitures and another in the context of fines, and that says a combined civil-criminal action (in either setting) eliminates the basis for any challenge at all.

B. After *Ursery*, It Is Not Clear What Additional Protection *Halper* Provides.

Nor, in light of *Ursery*, is it even clear what added protection *Halper* still provides. If the only thing *Halper* does is require States to establish a rational means-end fit for civil sanctions, it is unclear how the double jeopardy clause even adds to the inquiry. The due process and equal protection clauses of the Fourteenth Amendment already require State legislatures to adopt rational legislation. *See Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955); *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943). And the excessive fines, cruel and unusual punishment, and due process clauses already circumscribe over-zealous sanctions.

Under these circumstances, the stakes of preserving the *Halper* rule remain conspicuously narrow. The rule comes into play only where the sanction:

(i) does not constitute a forfeiture, in which case *Halper* already does not apply, *see Ursery*;
(ii) does not rise to the level of a criminal punishment, in which case the criminal procedure protections of the Fifth, Sixth and Fourteenth Amendments already protect the individual;
(iii) does not constitute an excessive fine or a cruel and unusual punishment, in which case the Eighth and Fourteenth Amendments already protect the individual, *see Kurth Ranch*, 511 U.S. 767, 797 (O'Connor, J. dissenting), *id.* at 803 n.2 (Scalia, J., dissenting);
(iv) does not constitute an irrational sanction, in which case the equal protection and due process clauses already protect the individual; and
(v) does not exceed the fine authorized by the State or federal legislature, in which case the due process clause already protects the individual.

We respectfully submit that the exceedingly modest gap in the panoply of individual liberty protections that *Halper*'s demise would create does not justify the doctrinal confusion it has generated in the lower courts.

C. The Excessive Fines And Due Process Clauses Provide A More Natural Framework For Curbing Excessive Fines.

With or without *Halper*, the Eighth Amendment already proscribes excessive fines. In contrast to the double jeopardy clause, whose "primary evil . . . is successive prosecutions," *Schiro v. Farley*, 510 U.S. 222, 230 (1994), the excessive fines clause has no other role to play in our constitutional system than to eradicate extravagant monetary penalties. For that reason, it is difficult to ascribe a state of mind to the drafters of the first eight amendments that would make sense out of placing in the Fifth, rather than the Eighth Amendment, the most potent limit on civil monetary sanctions that are "overwhelmingly disproportionate" to the damages caused. *Halper*, 490 U.S. at 449. Still less is it possible to do so for the people who ratified these amendments and had only the words of the provisions to go by.

Two post-*Halper* cases confirm that the clause offers the very sort of constitutional protection that the facts of *Halper* demanded. In *Browning Ferris v. Kelco Disposal*, 492 U.S. 257 (1989), the Court acknowledged that the government's recovery of monetary penalties in a civil proceeding raised Eighth Amendment concerns. *Id.* at 257 n. 21. Recognizing that the clause was intended by the Framers as a check against prosecutorial power, the Court held that it limited "only those fines directly imposed by, and payable to the government." *Id.* at 268. Although the Court was unwilling to extend Eighth Amendment protections to private litigants, it was careful not to "go so far as to hold that the excessive fines clause applies just to criminal cases." *Id.* at 263.

Austin v. United States, 509 U.S. 602 (1993), made express what *Browning-Ferris* hinted, namely, that the excessive fines clause limits civil sanctions imposed by the government. According to *Austin*, the critical inquiry is not whether a particular proceeding is criminal or civil, but whether it constitutes punishment. *Id.* at 610. To be sure, just as *Halper* purported to limit the consequences of its double jeopardy punishment inquiry to the "rare," or "overwhelmingly disproportionate," civil punishment, *id.* at 449, so too limitations imposed by the excessive fines clause remain limited to the rare, pervasively punitive, civil sanction. Still, the clause is not an empty restriction. Various lower courts have already used the clause to check a series of civil sanctions. *See e.g. United States v. Dean*, 80 F.3d 1535, 1539-43 (11th Cir. 1996); *United States v. One Single Family Residence Located at 18755 North Bay Road*, 13 F.3d 1493, 1498-99 (11th Cir. 1994); *United States v. Sarbello*, 985 F.2d 716, 717-18, 725 n.16 (3rd Cir. 1993); *United States v. Real Property Located at 6625 Zumirez Drive*, 845 F. Supp. 725, 737, 742 (C.D. Cal. 1994); *In Re Forfeiture of 1990 Chevrolet Blazer*, 684 So.2d 197, 199 (Fla. Ct. App. 1996), *review denied*, 695 So.2d 699 (Fla. 1997); *Thompson v. Grindle*, 113 Md. App. 477, 494-95, 688 A.2d 466, 474 (Md. Ct. App. 1997), *cert. granted*, 346 Md. 28, 694 A.2d 951 (1997); *State v. A House and 1.37 Acres of Real Property Located At 392 South 600 East*, 886 P.2d 534, 541 (Utah 1994).

Even assuming that the excessive fines clause fails to address each of the concerns outlined in *Halper*, the more flexible requirements of the due process clause provide a better safety valve for checking the occasional over-zealous prosecutor than the double jeopardy clause. As the Court has long recognized, and as the States well understand, the due process clause itself also places limits on government prosecutions. *See United States v. Goodwin*, 457 U.S. 368,

384-86 (1982) (due process prohibits prosecutors from bringing additional vindictive, retaliatory charges against a defendant who exercises his right to a jury trial in response to the original charge); *Blackledge v. Perry*, 417 U.S. 21, 28-29 (1974) (due process prohibits prosecutors from bringing more serious charges against a defendant in response to his invocation of a statutory right to appeal); *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969) (due process prevents a judge from imposing a higher sentence upon retrial to punish a defendant for appealing).

Taken together, the excessive fines and due process clauses also adequately address one of the underlying rationales for the *Halper* rule -- "the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." 390 U.S. at 451 n.10. At one level, law breakers have little reason to object to collateral civil proceedings. They cannot tenably complain about a "legitimate expectation of finality" after the first proceeding (*Jones v. Thomas*, 491 U.S. 376, 385 (1989)) when the legislature has "prescribed in advance" dual civil and criminal sanctions for their misconduct. *Hess*, 317 U.S. at 355 (Frankfurter, J., concurring). But at another level, the defendants have every right to complain. The government may not engage in vindictive prosecution or impose fines that singly or cumulatively are grossly excessive. It is just that the due process and excessive fines clauses, not the double jeopardy clause, safeguard these rights. Compare Brief for the United States, at 26-28, *United States v. Ursery*, Nos. 95-345 and 95-346 (O.T. 1995).

In sum, while *Halper* has spawned a host of troubling questions concerning the proper scope of the double jeopardy clause, it has not even measurably advanced the protections covered by the clause. Instead of forcing government

attorneys under *Halper* to the unthinkable (lumping civil and criminal penalties into one proceeding), or to the unpredictable (leaving them guessing as to whether a second action may be pursued), the excessive fines and due process clauses more appropriately regulate these areas. They leave to legislatures the policy of defining crimes and setting punishments, without leaving defendants unprotected from grossly excessive penalties such as those once faced by Mr. Halper.

CONCLUSION

The *amici* States respectfully urge the Court to affirm the decision below and in the process to overrule the analysis, though not necessarily the result, of *United States v. Halper*, 390 U.S. 435 (1989).

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